

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Robert N. MARSHBURN,III 43308

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2415

Robert N. MARSHBURN,III

This appeal has been taken in accordance with 46 U.S.C. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J.).

By order dated 13 February 1984, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license for three months on six months' probation upon finding proved the charge of negligence. The specification found proved alleges that while serving as Operator aboard the Tug CHAUNCY [sic], under the authority of the captioned document, on 26 August 1983, while the vessel was navigating the Alligator River - Pungo River Canal, NC, Appellant maneuvered his flotilla - the towing vessel and two nonpropelled barges - resulting in an collision between the lead barge and the Fairfield Swing Bridge.

The hearing was held at Wilmington, North Carolina, on 15 September 1983.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence four exhibits and the testimony of three witnesses.

In defense, Appellant testified on his own behalf.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved, and entered a written order suspending all licenses and documents issued to Appellant for a period of three months on six months' probation.

The complete Decision and Order was served on 10 January 1984. Appeal was timely filed on 12 March 1984 and perfected on 19 June 1984.

FINDINGS OF FACT

At all relevant times on 26 August 1983, Appellant was serving as Operator aboard the M/V CHAUNCEY, a twin-engine towing vessel, under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vssels. The M/V CHAUNCEY, pushing two loaded closed hopper barges, was underway northbound on the Intracoastal Waterway.

The F##* Prev. block could not be parsed for attributes -- Contact Shaffstall Support **# lot. The view to the south from the parking lot is obscured.

On 26 August 1983 at 0755, Mr. Garrish, the bridge tender who was scheduled to relieve Mr. Cuttrell, the prior watch stander, arrived in the parking lot. The two men met in the parking lot and exchanged greetings. Mr. Cuttrell mentioned that a towing vessel was "somewhere down the canal." The two men talked about fifteen minutes. At that point, a radio call was received from the CHAUNCEY. The men heard the radio call over an exterior loud speaker at the bridge tender's office. Mr. Garrish went up on the bridge toward the bridge tender's office. As he was walking across the bridge, he saw the CHAUNCEY and its tow, about 400 yards away, approaching the closed swing bridge. Mr. Garrish waved his hands over his head, giving the customary signal to stop.

Appellant had been operating the CHAUNCEY at two-thirds speed for the stated reason of reducing the possibility of "sucking water from the banks and creating suction to the bottom and picking up foreign objects off the bottom." Appellant first sighted the bridge approximately 600 feet south of a bend in the waterway, which is approximately one half mile from the bridge. As Appellant was navigating through the bend, he signaled for a bridge opening via radio. He received no response, and called again. No sound signals were given. At this point, Appellant reduced the forward speed to half, then he saw t##* Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

Appellant immediately put the vessel's engine in reverse. However, a stump became lodged in the starboard kort nozzle and the

r.p.m. for that engine dropped to zero. Appellant was able to dislodge the stump by throwing the engine into forward and then again into reverse, but as he backed down the lead barge struck the bridge.

It is common knowledge that along this portion of the waterway stumps and tree limbs can be picked up by transiting vessels.

BASES OF APPEAL

Appellant advances several ground for appeal. First, he argues that the sole cause of the collision was the inattention of the bridgetender. Second, he takes exception to the conclusion of the Administrative Law Judge that the absence of sound signals is particularly relevant. Third, he excepts to the Administrative Law Judge's statement that the decision is confined to the narrow issue of whether Appellant was negligent and not to the contributing negligence, if*** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

OPINION

I

Appellant argues that the allision was the sole fault of the bridgetender. Appellant misapprehends the issue.

Appellant contends that "this matter boils down" to whether the rule of *The Pennsylvania*, 86 U.S. 125 (1873) applies. The rule provides a presumption concerning the cause of a casualty when a navigation rule has been violated. Causation, however, is not the issue here.

Whether or not the actions of the bridgetender actually caused the collision is not an element of negligence. It is not the function of suspension and revocation actions to determine liability. "[O]ur inquiry is limited to whether the respondent acted negligently." Appeal Decision 2277 (BANASHAK). See also Appeal Decisions 2358 (BUISET), 2261 (SAVOIE), and 2174 (TINGLEY). Application of the Pennsylvania Rule was not necessary to establish negligence. It is not, however, improper to allege and prove*** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

The Administrative Law Judge took care to point out that the negligence of the bridgetender is not at issue. While I agree with the Administrative Law Judge that Appellant's negligence resulted in

the collision with the bridge, the issue here is not the result of Appellant's alleged negligence, but whether he was negligent. See Appeal Decisions 280 (HALL), 2175 (RIVERA), and 2096 (TAYLOR and WOODS).

The Administrative Law Judge determined that Appellant's failure to sound a proper whistle signal as required by law, coupled with his action in continuing to proceed toward the draw in the absence of radio contact, constituted a violation of the pertinent regulation and constituted negligence. I find no abuse of discretion in this determination, and I will not disturb it on appeal.

II

Appellant next excepts "to that portion of the . . . Decision and Order where the [Administrative Law Judge] says 'the absence of sound signals in this case is particularly relevant since the bridge tender was away from the tender house and located in the parking lot, where a clear view of the waterway south of the bridge was not available', and all subsequent findings flowing from that Opinion."

As noted *infra*, the absence of sound signals was a factor considered by the Administrative Law Judge in his determination that a presumption of negligence applies in this case.

It is well settled that a presumption of negligence arises when a moving vessel strikes a stationary object. *Woods v. United States*, 681 F.2d 988 (5th Cir. 1982); Appeal Decisions 2173 (PIERCE), *aff'd sub nom. Commandant v. Pierce*, NTSB Order EM-81 (1980), 2380 (HALL), 2379 (DRUM), and 2368 (MADJIWITA), *aff'd sub nom. Commandant v. Madjiwita*, NTSB Order EM-120 (1985).

Appellant contends that the presumption does not apply, since the swing portion of the bridge is not a stationary object. In support of this contention, Appellant cites *Clement v. Metropolitan West Side El. Ry. Co.*, 123 F. 271 (7th Cir. 1903).

In *Clement*, the court considered a case where a vessel gave the appropriate signal, but the bridge did not open in time to avoid a collision. The court stated:

If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge, and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be

timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened, when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern. *Id.* at 273 (citation omitted) (Emphasis supplied). See also *United States v. Sabine Towing and Transportation Co.*, 289 F.Supp 250, 258, 1969 A.M.C. 624, (E.D. La. 1968); *Pennsylvania RR Co. v. SS Marie Leonhardt*, 202 F. Supp. 368, 376 (E.D. Pa. 1962), *aff'd* 52 F.2d 262 (3rd Cir. 1963).

The Administrative Law Judge determined that the presumption of negligence applies since Appellant did not fall within the exception recognized by the court, i.e. he did not give proper sound signals.

At the time of this incident, the applicable regulations (33 CFR 117.1b) provided, in pertinent part:

(a) Sound Signals. Sound signals shall be the primary signals to be used if weather conditions will permit . . . These signals may be made by a whistle, or horn, or by shouting through a megaphone, or by other simple devices producing sound that can be clearly heard . . .

* * * * *

(d) Radiotelephones. When the request for draw opening and the answering acknowledgment is given by radiotelephone, sound or visual signals need not be used. Both vessel and bridge must continue to monitor the selected channel until the vessel has cleared the draw. If radiotelephone contact cannot be maintained, sound or visual signals shall be used. (Emphasis supplied.)

It is undisputed that Appellant did not sound any whistle signals, but, rather, relied on radio calls. Moreover, it was established that his radio transmissions were not answered by the bridge. Without an acknowledgment from the bridgetender, Appellant cannot claim to have made a proper alternative arrangement for opening the bridge. Accordingly, the Administrative Law Judge correctly applied the presumption of negligence.

III

Appellant next objects to the Administrative Law Judge's

statement that the decision is confined to the narrow issue of whether Appellant was negligent and not to the contributing negligence, if any, of the bridgetender. As discussed supra, however, this is precisely the issue which was before the Administrative Law Judge, and I find no impropriety in his resolution of it.

IV

Finally, Appellant excepts to the finding of the Administrative Law Judge that the charge and specification was proved by substantial evidence of a reliable and probative nature, contending that all the evidence is to the contrary. I disagree.

It is undisputed that Appellant failed to sound a proper whistle signal, and, despite the fact that he was not in radio communication with the bridge, continued to proceed. In addition to finding the presumption of negligence applicable, the Administrative Law Judge determined, without the invocation of a presumption, that Appellant's conduct constituted negligence. I find this determination to be well within the discretion of the Administrative Law Judge, and I will not disturb it on appeal.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia, on 13 February 1984 is AFFIRMED.

B. L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 27th day of November 1985.

***** END OF DECISION NO. 2415 *****

